Supreme Court, U.S.
FILED

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No. 01-

IN THE

Supreme Court of the United States

EDWARD R. POPICK,

Petitioner,

v.

MICHAEL MOORE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEVEN WISOTSKY
Attorney for Petitioner
3050 Jefferson Street
Coconut Grove, FL 33133
305-858-2436

173186

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

36pp

QUESTIONS PRESENTED

I. Whether the principle of *nulla poena sine lege* is a requirement of due process of law and thus establishes a "constitutional right" for purposes of issuing a certificate of appealability.

II. Whether a federal habeas court may construe a state criminal statute so as to "save" the statute from noncompliance with the principle of *nulla poena sine lege*.

III. Whether this Court should exercise its supervisory power over a decision of a court of appeals that has sanctioned a departure from the accepted and usual course of proceedings in denying habeas relief and a certificate of appealability therefrom.

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Edward R. Popick respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Eleventh Circuit entered on December 31, 2001 in *Popick v. Moore*, Case No. 01-15024-E.

OPINIONS BELOW

A copy of the district judge's denial of the petition for a writ of habeas corpus is attached as Appendix C. A copy of the denial of the motion for a certificate of appealability by a single judge of the court of appeals is attached as Appendix A. A copy of the denial of the motion for a certificate of appealability by the district judge is attached as Appendix B. A copy of the denial of the motion for a certificate of appealability by a panel of the court of appeals upon reconsideration is attached as Appendix D.

STATEMENT OF JURISDICTION

The final decision of the United States Court of Appeals for the Eleventh Circuit was entered on December 31, 2001. This petition is timely filed pursuant to S. Ct. Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, U.S. Constitution: ". . . nor shall any State deprive any person of life, liberty or property without due process of law. . . ."

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 2253(c)(2)
Fla. Stat. § 893.135(1)(c)
Fla. Stat. § 893.03(2)(a)1.k
Fla. Stat. 893.13

STATEMENT OF THE CASE AND FACTS

In an Information filed on April 28, 1993, Dr. Popick was charged with four counts of trafficking in hydromorphone (trade name Dilaudid) in violation of *Fla. Stat.* § 893.135(1)(c) (1991). An amended information of March 8, 1994 added 63 counts. At that time, *Fla. Stat.* § 893.135(1)(c) prohibited "trafficking in illegal drugs" by "[a]ny person who knowingly sells . . . 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof. . . ." Hydromorphone was not listed.

On March 16, 1994, Dr. Popick pleaded guilty to all sixty-seven counts of trafficking. In 1995, the Florida Legislature recognized several gaps in the trafficking statute and "create[d] the offenses of trafficking in oxycodone, hydrocodone, hydromorphone, or any salt, isomer, or salt of an isomer of these substances."[1] The legislative staff analysis

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1. The legislative staff analysis of CS/HB 1385, the bill that became Fla. Stat. § 893.135(1)(C)1, explained that the "the bill amends s.893.135(1)(C)1 to *create* the offences of trafficking in oxycodone, hydrocodone, *hydromorphone*, or any salt, isomer or salt of an isomer of these substances." [*e.s.*] Under the heading "Effect of Proposed Changes," the staff analysis concludes that trafficking in hydromorphone "*will be prohibited and made a first degree felony*." [e.s.] [Quotations from "Final Bill Analysis & Economic Impact Statement," May 12, 1995.]

for the bill stated that hydromorphone is one of several "semi-synthetic derivatives of opium which are not listed in this statute. . . ."[2]

In 1999, after unsuccessful postconviction proceedings in the state courts, Dr. Popick filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida (Tampa Division). In its order of July 30, 2001, the district court found that as his first claim "Popick alleges that trafficking in hydromorphone was not a crime in Florida in 1994 when he entered his guilty plea." App. C-7a. The court concluded that "Popick has adequately exhausted state court remedies for his first ground for relief." *Id.*

The district court acknowledged that "[t]he 1991 version" of § 893.135(1)(c), the trafficking statute, did not list hydromorphone, although it was listed in § 893.03(2)(a)1.k as a Schedule II controlled substance. App. C-9a. The district court further observed that "[t]he 1991 version of the [trafficking] statute only covers the forms containing opium or morphine. The 1995 version corrects this oversight and includes the specified drugs. . . ." App. C-11a.

The court further acknowledged Petitioner's reliance upon this passage from *State v. Diloreto*, 600 So. 2d 25, 26 (Fla. 4th DCA 1992):

> trafficking under section 893.135(1)(c)3(1989) does not encompass all controlled substances listed in sections 893.03(1)(b) or (2)(a), Florida Statutes, but only those specified by its terms. The statute must be accorded its plain meaning.

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2. *Id.*

The district court proceeded to question the continuing validity of *Diloreto* in light of dictum in another Florida case, *Todd v. State*, 648 So. 2d 249 (Fla. 3d DCA 1994). App. C-14a. The court then concluded that "[t]he reference in § 893.135(1)(c) sufficiently identifies hydromorphone as subject to the trafficking statute to satisfy the requirement of due process." App. C-14a. In reaching this conclusion, the court recited from the PDR, correctly, that Dilaudid is "a hydrogenated ketone of morphine, a derivative of opium." It did not in that regard acknowledge that the word "derivative" was of 1995 vintage and did not appear in the 1991 statute, which proscribes only "any salt, isomer, or salt of an isomer thereof" of the listed substances.[3] The court denied the petition for writ of habeas corpus. App. C-15a.

Subsequently, Petitioner filed a notice of appeal and moved in the district court for a certificate of appealability [COA] on the ground that the petition presented a substantial showing of the denial of a federal right" under *Barefoot v. Estelle*, 463 U.S. 880, 893, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983) and that "jurists of reason" could reach a different result. *Roberts v. Sutton*, 217 F.3d 1337, 1339 (11th Cir. 2000). Petitioner further urged that it was improper for the habeas court to supply a saving construction to a state statute and that, if the statute was to be construed at all, it should be done by the Florida Supreme Court pursuant to *Fla. R. App. P.* 9.150, a procedure well known to the Eleventh Circuit. *See Blue Cross and Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1413 (11th Cir. 1997). The district court, citing *Estelle*, denied the COA. App. B-4a.

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3. A ketone is "an organic chemical compound containing the divalent carbonyl group, CO, in combination with two hydrocarbon radicals." *Webster's New Universal Unabridged Dictionary* (2d ed. 1999). It is not a "salt, isomer, or salt of an isomer."

Petitioner then moved in the court of appeals for a COA. A single judge denied the COA for "the reasons outlined at length in the district court's thorough order. . . ." App. A-2a. Pursuant to 11th Cir. R. 27-1(d), Petitioner moved for panel reconsideration. In its order of December 31, 2001, the court reconsidered but again denied the COA "for failure to make the requisite showing." App. D-16a.

SUMMARY OF THE ARGUMENT

Petitioner was convicted of and punished for a non-existent crime. Each of his applications for a certificate of appealability was denied on the basis that he had failed to make a "substantial showing" of the denial of a federal right. It was impossible to reach such a conclusion without denigrating the principle of legality as a requirement of due process of law binding on habeas review and sufficient to require the issuance of a certificate of appealability. This Court should grant a writ of certiorari to review the decision below in order to establish that the principle of legality, *nulla poena sine lege*, is "not only an ancient maxim" but also "a requisite of due process." *United States v. Bodiford*, 753 F.2d 380, 382 (5th Cir. 1985). It does not appear that this Court has ever squarely so held, either on direct review or collateral review. This case presents an appropriate vehicle for doing so.

Second, the state penal statute at issue was "saved" from noncompliance with the principle of legality by a construction supplied by the habeas court, in complete disregard of the rule of lenity. Further, construction of the statute and its interpretive case law violated principles of federalism and comity. A federal court is bound to take a challenged state statute at face value. *Coates v. City of Cincinnati*, 402 U.S.

611, 614, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971). "Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out . . . , we are without power to remedy the defects. . . ." *Hynes v. Oradell*, 425 U.S. 610, 622, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

Finally, certiorari should be granted in the exercise of this Court's supervisory power over a decision of a court of appeals that has sanctioned a departure from the accepted and usual course of judicial proceedings in denying Petitioner a COA from the denial of habeas relief.

REASONS FOR GRANTING THE WRIT

I. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE IMPORTANT CONSTITUTIONAL ISSUE WHETHER THE PRINCIPLE OF *NULLA POENA SINE LEGE* IS A REQUIREMENT OF DUE PROCESS OF LAW AND AS SUCH A "CONSTITUTIONAL RIGHT" SUFFICIENT TO REQUIRE ISSUANCE OF A COA FROM THE DENIAL OF HABEAS RELIEF.

The principle of legality is "*the* first principle" of American criminal law. Herbert L. Packer, THE LIMITS OF THE CRIMINAL SANCTION 79-80 (1968). It pre-dates the adoption of the U.S. Constitution. It has been described as "the most fundamental principle of our criminal justice system" and means that "no punishment may be inflicted except for violation of law." *United States v. Carpenter's Goldfish Farm*, 998 F.2d 692, 695 (9th Cir. 1993). "We thus have a system in which persons can be subjected to punishment only for violation of specific statutes. . . ." *Id.* "[I]t is elementary that a defendant may be convicted only of an offense defined by statute, not because his conduct is reprehensible."

United States v. Bodiford, 753 F.2d 380, 382 (5th Cir.1985). This requirement of prior definition of a crime is at the heart of the rule of law characteristic of Anglo-American jurisprudence. J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 28 (2d ed. 1960).

The acts for which Dr. Popick was punished were not "clearly forbidden" as trafficking in violation of Florida law at the time of his convictions, as required by the principle of *nulla poena sine lege*. Rather, the federal habeas judge declared that such acts were covered by the 1991 statute, despite its facial silence on the matter and subsequent amendment to "create" the very offenses of which Petitioner was previously convicted. Such federal construction of a state penal statute was improper in and of itself under principles of federalism and comity.

Further, to arrive at his elliptical conclusion that "[t]he reference in § 893.135(1)(c) sufficiently identifies hydromorphone as subject to the trafficking statute," the habeas judge necessarily disregarded the principle of lenity, which requires as a prerequisite to conviction of crime that defendant's conduct must be "plainly and unmistakably" within the charged statute. *United States v. Gradwell*, 243 U.S. 476, 485, 37 S. Ct. 404, 410 L. Ed. 857 (1917). As this Court has said more recently, "the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply only to conduct clearly covered." *United States v. Lanier*, 520 U.S. 259, 266, 117 S. Ct. 1219, 137 L. Ed. 2d 432 (1997).

The rule of lenity, moreover, is part and parcel of the principle of legality. As the distinguished jurist and legal scholar Judge Jack Weinstein has put it, "[t]he rule of lenity, favoring the defendant, dovetails with the common law

maxim of *nulla poena sine lege* (there can be no punishment without law)." *United States v. H*, 2001 WL 1646465, *7 (E.D.N.Y.). One searches the orders of the courts below in vain for any mention of the rule of lenity or the principle of *nulla poena* of which it is a part. On the contrary, the court of appeals explicitly endorsed the reasoning of the district court. App. A-2a.

Although the lower federal courts have not infrequently invoked the maxim of *nulla poena*, this Court has not apparently ever held it to be a requisite of due process of law either on direct review or on habeas review. *But cf. Thompson v. City of Louisville*, 362 U.S. 199, 80 S. Ct. 624, 4 L. Ed. 2d 654 (1960). *See also Kring v. Missouri*, 107 U.S. 221, 230-31, 2 S. Ct. 443, 27 L. Ed. 506 (1883), invoking the principle of legality in the context of *ex post facto* analysis: "No one can be criminally punished in this country, except according to a law prescribed for his government by the sovereign authority, before the imputed offence was committed, and which existed as a law at that time."

Four members of this Court did invoke the *nulla poena sine lege* principle of legality in *Rogers v. Tennessee*, 532 U.S. 451, 467, 121 S. Ct. 1693, 149 L. Ed. 2d 697 (2001), describing it as "one of the most 'widely held value judgments in the entire history of human thought'. J. Hall, GENERAL PRINCIPLES OF CRIMINAL LAW 59 (2d ed. 1960)." (Scalia, J., dissenting). But the majority viewed the case as one involving only adjudicative changes in controlling penal law, rather than application of a statute to conduct outside its reach. Thus, this Court has yet to speak authoritatively on the constitutional status of *nulla poena sine lege*.

This case provides an appropriate vehicle for ruling on that issue. In denying Petitioner's applications for a COA,

the lower courts necessarily disregarded or undervalued the proper weight to be accorded to a violation of the principle of legality inherent in the State's convicting Petitioner of non-existent trafficking offenses. Even if the district court's "close enough"[4] reasoning be credited as a basis for denying the writ, it was not possible reasonably to negate that "jurists of reason" might differ on appeal without denigrating the constitutional stature of the principle of legality. The court of appeals should have issued a COA.

II. A FEDERAL HABEAS COURT MAY NOT CONSTRUE A STATE CRIMINAL STATUTE SO AS TO "SAVE" THE STATUTE FROM NONCOMPLIANCE WITH THE PRINCIPLE OF *NULLA POENA SINE LEGE*.

The district judge never squarely stated that § 893.135 included hydromorphone, and of course the statute did not do so by its terms. On the contrary, his order concedes that it was not a listed drug in the 1991 version and stated that the Legislature corrected this "oversight" by adding hydromorphone in the 1995 version. App. C-11a. Rather than invoking the rule of lenity, he engaged in an exceptionally athletic construction of a state penal statute that was not ambiguous to begin with. This was doubly improper.

First, a federal court must take a challenged state statute at face value and cannot find it valid on the basis of a limiting

4. Without quite saying so, the district court implied that Petitioner was not entitled to relief from the trafficking offenses because he might have been convicted of non-trafficking drug offenses. *See* App. C-13a n.6. That implication is wrong. "Under our system of criminal justice even a thief is entitled to complain that he has been unconstitutionally convicted and imprisoned as a burglar." *Jackson v. Virginia*, 443 U.S. 307, 323, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979).

construction that it supplies. *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S. Ct. 1686, 29 L. Ed. 2d 214 (1971). "Even assuming that a more explicit limiting interpretation of the ordinance could remedy the flaws we have pointed out . . . , we are without power to remedy the defects. . . ." *Hynes v. Oradell*, 425 U.S. 610, 622, 96 S. Ct. 1755, 48 L. Ed. 2d 243 (1976).

Second, the judicial construction that he employed "was unexpected and indefensible by reference to the law which had] been expressed prior to the conduct in issue." *Bouie v. City of Columbia*, 378 U.S. 347, 354, 84 S. Ct. 1697, 12 L. Ed. 2d 894 (1964). "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Id.* at 352. The case condemns "judicial enlargement of a criminal act by interpretation." *Id.*

It would have been unconstitutional for such a result to have been created by the state court of last resort, much less a federal habeas judge. Thus, even assuming *arguendo* that the federal habeas judge had the authority to construe a state penal statute at all, the principle of legality barred him from reaching the result that he reached. It is of no consequence that Petitioner might have been charged with the less serious violation of § 893.13 because that section specifically incorporates by reference controlled substances listed in § 893.03(2)(a).[5] Again, Petitioner presented a substantial

5. Violation of § 893.13 is a second degree felony, whereas trafficking under § 893.135 is a first degree felony. Under *Calder v. Bull*, 3 Dall. 386, 390, 3 U.S. 386, 1 L. Ed. 648 (1798), a law is prohibited as ex post facto if it "aggravates a crime, or makes it greater than it was when it was committed."

showing of the denial of a constitutional right under 28 U.S.C. § 2253(c)(2), and the court of appeals should not have denied a COA.

III. CERTIORARI SHOULD BE GRANTED TO EXERCISE THIS COURT'S SUPERVISORY POWER OVER A DECISION OF A COURT OF APPEALS THAT HAS SANCTIONED A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN DENYING HABEAS RELIEF AND A COA.

Petitioner adopts and incorporates by reference the arguments made in support of Points I and II above. His claim that trafficking in hydromorphone was not a crime in Florida at the time of his convictions was certainly a substantial showing of the denial of a constitutional right, and it was sufficiently debatable among jurists of reason to require issuance of a COA. The district court should not have turned interpretive somersaults with the trafficking statute, surrounding case law and organic chemistry[6] to deny relief and then also deny a COA. Affirmance of the denial of a COA by the court of appeals, based explicitly on the reasoning of the district court, is sufficient in the circumstances of this case to call for the exercise of this Court's supervisory power under S. Ct. Rule 10(a).

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6. The district court trivialized *Diloreto*'s point that trafficking "does not encompass all controlled substances" by engaging in an extended and somewhat convoluted argument, grounded in chemistry, as to the organic or synthetic form of listed drugs and then improperly placing a burden of proof on Petitioner as to the source or origin of the drugs that he allegedly distributed. App. C-14a. But this case is not about chemistry or evidence; it is about what was listed by name in the 1991 statute — and what was not.

CONCLUSION

The petition for a writ of certiorari should be granted. The cause should be remanded to the court of appeals for issuance of a COA and to allow an appeal on the merits of Petitioner's claim that trafficking in hydromorphone was not a crime under Florida law at the time of his convictions.

Respectfully submitted,

STEVEN WISOTSKY
Attorney for Petitioner
3050 Jefferson Street
Coconut Grove, FL 33133
305-858-2436

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED AND FILED NOVEMBER 20, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-15024-E

EDWARD R. POPICK,

Petitioner-Appellant,

versus

MICHAEL MOORE,
Director of Florida Department of Corrections,
ROBERT A. BUTTERWORTH,
Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

ORDER:

Appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

Appendix A

Appellant raised three claims, two of which he defaulted in state court. His only remaining claim was that his offense of conviction was not a crime under existing Florida law at the time of his indictment and conviction. For the reasons outlined at length in the district court's thorough order, we find that the district court properly denied appellant's § 2254 petition on both substantive and procedural grounds and that appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED AUGUST 31, 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:99-CV-134-T-23EAJ

EDWARD R. POPICK,

Petitioner,

v.

MICHAEL W. MOORE,

Respondent.

ORDER

Petitioner Edward R. Popick (Popick) has filed a Notice of Appeal (Doc. 17), which is deemed to include a Motion for Certificate of Appealability. *Edwards v. United States*, 114 F.3d 1083 (11th Cir. 1997).

On April 24, 1996, the President signed into law amendments to 28 U.S.C. §§ 2244, 2253, 2254, 2255, Appellate Rule 22, and 21 U.S.C. § 848(q). As a result, this Court should grant an application for certificate of appealability only if the petitioner makes a substantial showing of the denial of a constitutional right. To make this

substantial showing, the petitioner "must demonstrate that the issues are debatable among jurists of reason" or "that a court could resolve the issues [differently]." *Barefoot v. Estelle*, 463 U.S. 880, 893 n.4 (1983) (citation omitted). In addition, the petitioner could show "the questions are adequate to deserve encouragement to proceed further." *Id.*

Specifically, where a district court has rejected a prisoner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *See Slack v. McDaniel*, 120 S.Ct. 1595, 1604 (2000); *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). When the district court has rejected a claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. *Slack*, 120 S.Ct. at 1604; *Franklin v. Hightower,* 215 F.3d 1196 (11th Cir. 2000) (per curiam).

In this action, the court rejected the petition for writ of habeas corpus on the merits and on procedural grounds. Popick has failed to make the necessary showings for issuance of a certificate of appealability. The requirement of a certificate of appealability was meant to prevent this type of petition from proceeding any further.

Accordingly, the Court orders:

Popick's construed Motion for Certificate of Appealability (Doc. 17) is **DENIED.**

Appendix B

ORDERED in Tampa, Florida, on August 31st, 2001.

s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION DATED AND FILED JULY 30, 2001

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

Case No. 8:99-CV-134-T-23EAJ

EDWARD R. POPICK,

Petitioner,

v.

MICHAEL W. MOORE,

Respondent.

ORDER

Edward R. Popick (Popick) petitions for the writ of habeas corpus pursuant to 28 U.S.C. § 2254. (Doc. 1) Respondent has filed an answer to the petition, and Popick has filed a reply. (Docs. 5, 6)

In an information filed on April 28, 1993, in the Circuit Court for Pinellas County, Florida, Popick was charged with four counts of trafficking in hydromorphone, commonly known by the trade name Dilaudid, in violation of § 893.135, Florida Statutes. On March 8, 1994, an amended information was filed which added sixty-three counts to the four count information.

Appendix C

On March 16, 1994, Popick pled guilty to all sixty-seven counts and was sentenced as contemplated during the plea negotiations.[1]

Popick raises three closely related and interdependent claims. First, Popick alleges that trafficking in hydromorphone was not a crime in Florida in 1994 when he entered his guilty plea. Second, Popick claims that his attorney was ineffective for (a) failing to challenge the information as failing to state a crime, (b) failing to advise him that trafficking in hydromorphone was not a crime in Florida, and (c) failing to use the non-existence of the trafficking offense to his advantage in plea negotiations. Third, Popick claims that his plea was involuntary because he believed trafficking in hydromorphone was a crime in Florida.

Popick has adequately exhausted state court remedies for his first ground for relief. On appeal from the denial of a motion for post-conviction relief under Florida Criminal Procedure Rule 3.850, Popick raised for the first time his claim that the trial court lacked subject matter jurisdiction because trafficking in hydromorphone was not a crime in Florida in 1994 when he entered his plea. Respondent contends that Ground One is procedurally barred because the claim was not timely raised in state court and because Popick couched his argument in state court strictly in terms of state law and advanced no federal due process argument, as now. However, Respondent's procedural bar arguments are rejected because the defense of lack of subject matter jurisdiction presents a claim of fundamental error and can

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1. Although Popick stated at the change of plea hearing that he did not intend to appeal, appellate paperwork was filed. However, Popick subsequently voluntarily dismissed the appeal.

be raised at any time. *E.g. Waters v. State*, 354 So.2d 1277 (Fla. 2d DCA 1978). In any event, the claim raised in state court was sufficiently similar to Ground One of the present petition to satisfy the exhaustion requirement.

Popick has not raised his remaining claims in state court. Therefore, those claims are not exhausted and are procedurally barred.[2] Popick has shown neither cause for the default nor actual prejudice as a result of the alleged violation, or that failure to consider the claims results in a fundamental miscarriage of justice, as required to overcome the default. *Coleman v. Thompson*, 501 U.S. 722 (1991).

Ground One — Merits

Popick stands convicted of trafficking in illegal drugs in violation of § 893.135, Florida Statutes. The 1991 version of that statute, which was in effect at the time of Popick's arrest, provided in pertinent part as follows:[3]

> Any person who knowingly sells . . . delivers . . . or who is knowingly in . . . possession of, 4 grams or more of any morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance . . . commits a felony of the

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2. Respondent has asserted that the claims are not exhausted and are procedurally barred.

3. Popick was arrested in March, 1993, for incidents occurring prior to March, 1993. Application of the 1993 version of the statute is limited to offenses committed on or after April 22, 1993. *See* § 893.135, Fla. Stat. (1993), Note 1(a).

> first degree, which felony shall be known as "trafficking in illegal drugs."

Section 893.135(1)(c), Fla. Stat. (1991). Hydromorphone is listed in § 893.03(2)(a)1.k.

In 1995, after Popick's conviction became final, the Florida legislature, recognizing that persons had avoided conviction under § 893.135(1)(c) for trafficking in semi-synthetic derivatives of opium that were not listed in the statute, including oxycodone, hydrocodone, and hydromorphone, amended § 893.135(1)(c) to read in pertinent part as follows:[4]

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4. The legislative notes for the bill which amended § 893.135(1)(c), CS/HB 1385, state in pertinent part:

> [T]he bill amends s. 893.135(1)(c) 1. to create the offenses of trafficking in oxycodone, hydrocodone, hydromorphone, or any salt, isomer, or salt of an isomer of these substances. The bill also amends this subsection to create the offenses of trafficking in any derivative of oxycodone, hydrocodone, hydromorphone, opium, morphine, or heroin.
>
> . . . . .
>
> In several recent court cases in Florida, persons avoided conviction under this section for trafficking in semi-synthetic derivatives of opium which are not listed in this statute, including oxycodone, hydrocodone, or hydromorphone.
>
> . . . . .
>
> Trafficking in oxycodone, hydrocodone, hydromorphone, or any derivative, salt, isomer or salt of an isomer, or any derivative or opium, morphine, or heroin will be prohibited and made a first degree felony.

(Doc. 6, Exhibit A)(spelling errors corrected).

Appendix C

> Any person who knowingly sells . . . delivers . . . or who is knowingly in . . . possession of, 4 grams or more of any morphine, opium, **oxycodone, hydrocodone, hydromorphone** or any salt, **derivative,** isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(l)(b) or (2)(a), or 4 grams or more of any mixture containing any such substance . . . commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs."

Section 893.135(1)(c), Fla. Stat. (1995) (emphasis added).

Only a few Florida cases provide guidance relative to Popick's claim.[5] In *State v. Diloreto*, 600 So.2d 25 (Fla 4th DCA 1992), Florida's Fourth District Court of Appeal affirmed an order granting a defendant's motion to dismiss a charge of trafficking in oxycodone as not stating a crime punishable under § 893.135(1)(c)(3)(1989). *Diloreto* determines that oxycodone is a derivative of thebaine, which is sometimes derived from a constituent of the opium plant but which is sometimes derived from a poppy other than the opium poppy. The state conceded that the controlled substance in *Diloreto* "is not heroin, morphine, opium, or

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5. Respondent cites only *Peoples v. State*, 576 So.2d 783 (Fla. 5th DCA 1991), in opposition to Petitioner's claim in Ground One. Peoples challenged on direct appeal his conviction for trafficking in hydromorphone under § 893.135(1)(c) 1 and 893.135(5), but did so on grounds other than the ground at issue here. *Peoples* demonstrates only that defendants other than Popick were convicted of trafficking in hydromorphone under § 893.135(1)(c) prior to the 1995 amendments to that statute.

any salt, isomer, or salt of an isomer, of morphine or opium; nor is it manufactured from any such substance." *Id.* at 25. The court held:

> The trial court correctly recognized that trafficking under section 893.135(1)(c) 3 (1989) does not encompass all controlled substances listed in sections 893.03(1)(b) or (2)(a); Florida Statutes, but only those specified by its terms. The statute must be accorded its plain meaning. The state would expand the interpretation of the statute to include all substances listed in section 893.03 (1) (b) or (2) (a), notwithstanding the explicit wording of the statute. However, criminal statutes must be strictly construed.

Id. (footnote and case citations omitted).

Diloreto involves a simple distinction: some drugs may appear in two or more forms, one or more of which contain an opium derivative and one or more of which contain no opium (or morphine). The 1991 version of the statute only covers the forms containing opium or morphine. The 1995 version corrects this oversight and includes the specified drugs, even if derived from a synthetic precursor, rather than opium. In other words, *Diloreto* turns on whether § 893.135(1)(c) (1989) proscribed trafficking in a drug derived from a non-opium plant. The *Diloreto* court's statement that § 893.135(1)(c) "does not encompass all controlled substances listed in sections 893.03(1)(b) or (2)(a), Florida Statutes, but only those specified by its terms" therefore applies only to drugs derived from non-opium plants and cannot be interpreted more broadly to apply also

to drugs which are derived from opium plants. Pursuant to *Diloreto*, trafficking in the drugs listed in § 893.03(1)(b) or (2)(a) is not prohibited under § 893.135(1)(c) unless the drugs listed in those sections are "morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin." Section 893.135(1)(c) 3, Fla. Stat. (1989).

Two years later in *State v. Collins*, 639 So.2d 633 (Fla. 2d DCA 1994), the State appealed an order dismissing an information charging the defendant with trafficking in oxycodone in violation of § 893.135(1)(c), Florida Statutes (1993). The court reversed and remanded for an evidentiary hearing to determine the botanical origin of the oxycodone, reasoning as follows:

> Although oxycodone is nominally within the classification of controlled substances referred to in section 893.03, Florida Statutes (1993), as a Schedule II derivative of opium, it is not proscribed by section 893.135(1)(c)(1) if it is obtained from a non-opium producing poppy. *State v. Diloreto*, 600 So.2d 25 (Fla. 4th DCA 1992). Of course, if the oxycodone in question originated in opium, the trial court was in error in dismissing the information in the light of section 893.135(1)(c) 1 which, in relevant part, provides that:
>
> > Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, or any salt, isomer,

> or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b) or (2)(a) or 4 grams or more of any mixture containing any such substance or mixture, commits a felony of the first degree which felony shall be known as "trafficking in illegal drugs."
>
> Here, unlike in *Diloreto*, a decision referred to by the state and [the defendant], there is neither a stipulation nor evidence disclosing that the organic source of the oxycodone excludes it from the Schedule II substances.

State v. Collins, 639 So.2d 633-634 (Fla. 2d DCA 1994).

Finally, in *Todd v. State*, 648 So.2d 249 (Fla. 3d DCA 1994), the defendant challenged his conviction by writ of coram nobis on the ground that Dilaudid is neither "morphine, opium, or any salt, isomer, or salt of an isomer thereof, including heroin" as specifically set forth in § 893.135(1)(c), Fla. Stat. (1987). Although the State conceded the defendant's argument, Florida's Third District Court of Appeal denied relief on the basis that, because the defendant and his attorney could easily have discovered the composition of Dilaudid at the time of the plea and asserted his claim then, one of the fundamental prerequisites for coram nobis relief, "due diligence," was therefore not satisfied.[6] In so finding, the

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6. The court found it inappropriate to forego the due diligence requirement under an actual innocence theory because the defendant was clearly guilty of the felony of simple possession of a substance designated in § 893.03 (2) (a) 1.k for which he could have been convicted and sentenced.

court explicitly avoided determining whether *Diloreto* was correctly decided. The court noted, however, that the prosecution had "rather persuasively" argued that the statutory interpretation utilized in *Diloreto* improperly reads out of the statute the phrase "as described in s. 893.03(1)(b) or (2)(a)." 648 So.2d. 249, 250 n.2

In the present case, Popick does not claim that the organic source of hydromorphone excludes it from the ambit of § 893.03(2)(a), and the State has not conceded that point. Nor does that argument have apparent merit. The Physician's Desk Reference (PDR), (1999 Edition), describes Dilaudid as "a hydrogenated ketone of morphine," a derivative of opium.

The reference in § 893.135(1)(c) to the substances listed in § 893.03(2)(a) sufficiently identifies hydromorphone as subject to the trafficking statute to satisfy the requirement of due process. Popick's argument that the reference to § 893.03(1)(b) and (2)(a) in 893.135(1)(c) modifies only the word "heroin" and not also the substances listed in the preceding phrase is rejected. As noted in *Todd*, *supra*, Popick's proposed construction of the statute improperly reads an important statutory phrase — "as described in s. 893.03(1)(b) or (2)(a)" — completely "out of the statute." Further, as indicated in *Collins*, *supra*, because hydromorphone originates in opium, Popick was not improperly charged with trafficking in that substance under § 893.135(1)(c).

Any claims or arguments not specifically addressed herein are rejected as lacking merit.

Appendix C

Accordingly, the Court orders:

1. Popick's petition for writ of habeas corpus is **DENIED.**

2. Popick's Request for Oral Argument (Doc. 10) is **DENIED.**

3. The Clerk shall enter judgment against Popick and close this file.

ORDERED in Tampa, Florida, on July 30th, 2001.

s/ Steven D. Merryday
Steven D. Merryday
UNITED STATES DISTRICT JUDGE

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DENYING MOTION FOR A CERTIFICATE OF APPEALABILITY DATED AND FILED DECEMBER 31, 2001

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 01-15024-E

EDWARD R. POPICK,

Petitioner-Appellant,

versus

MICHAEL MOORE,
Director of Florida Department of Corrections,
ROBERT A. BUTTERWORTH,
Attorney General of the State of Florida,

Respondents-Appellees.

Appeal from the United States District Court for the Middle District of Florida

Before **CARNES and HULL, Circuit Judges.**

BY THE COURT:

Upon reconsideration of this Court's order dated November 20, 2001, appellant's motion for a certificate of appealability is DENIED for failure to make the requisite showing. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 478, 120 S.Ct. 1595, 1600-01, 146 L.Ed.2d 542 (2000).